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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-355

SAUDCO LIMITED AND WILLIAM L. TAUB,
Petitioners,

v.

TWENTIETH CENTURY-FOX FILM
CORPORATION, *et al.,*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI**

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Respondents, the plaintiffs in the District Court and appellees in the Court of Appeals, oppose the Petition of Saudco Limited and William L. Taub for a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari should be denied because:

(1) Rule 19 does not provide any basis for granting the Petition; and

(2) the petitioners seek to present a question which was never raised in the District Court or in the Appellate Court.

Although the Petition does irreparable damage to the factual record and legal issues in this action, we do not stop to correct these gross distortions because they are, in all events, irrelevant to this Court's consideration of the Petition. Petitioners simply have shown no basis that would justify the granting of a Writ of Certiorari.

In 1975, a default judgment determining the petitioners' liability (A1-A3*) was granted by the District Court because of the petitioners' intractable refusal to give any discovery. (Petition, p. 6) As the Fifth Circuit pointed out in its opinion affirming the judgment as to damages, "Defendants have not contested the District Court's adjudication of their liability." (A15)

In 1977, the District Court entered its Judgment as to Damages (A7-A11) setting forth the course of events and considerations underlying its determination of damages. Damages were assessed pursuant to the discretionary authority granted by Congress in Section 101 of the Copyright Law (17 U.S.C. § 101) based upon facts deemed to have been admitted by petitioners:

"On December 1st, 1976, the Plaintiffs filed, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 10(J) of the rules of this Court, Requests for Admissions and a Statement of Material Facts and Proposed Findings and Conclusions. *They were never answered by the Defendants and, thus, are deemed admitted.* They are incorporated herein by reference. *These admissions by the defendants substantiate the*

*Citations preceded by the letter "A" are to the opinions below included as an appendix to the Petition.

plaintiffs' claim for damages, sanctions, and attorneys' fees and are dispositive of those issues in this case. There remains no genuine issue of material facts which would preclude a Summary Judgment for the plaintiffs in this case on the issues of damages and attorneys' fees and sanctions." (A7) (Emphasis added.)

The District Court gave the petitioners ample opportunity to contest the facts and was met with contumacious refusal. Its opinion recites the facts:

"On November 11, 1976, the Court ordered that each party answer a questionnaire as to the current status of this case. The defendants made no reply. The Court ordered the defendants to show cause, on February 22nd, 1977, why the plaintiffs' Motion for Summary Judgment should not be granted. The defendants' attorney appeared and was given ten (10) days to reply to the Court's Order. No reply was submitted. On March 10, 1977, a further hearing was held on this Order. The secretary of defendants' counsel appeared in Court explaining the absence of the attorney for the defendants. After the elapse of another ten (10) days, and without any reply from the defendants, this Court determined to rule on the plaintiffs' Motions for Summary Judgment and for sanctions." (A7-A8)

On the basis of the facts admitted by the petitioners, the District Court found that the "defendants knowingly, willfully and with notice infringed upon the plaintiffs' copyrights in violation of the Copyright Laws of the United States" at least 106 times. (A9) Accordingly, "[i]n the exercise of the court's discretion pursuant to

Section 101 of Title 17 U.S. Code," and on the admitted facts, the District Court assessed statutory damages in the amount of \$5,000 per infringement. (*Id.*) In so doing, the District Court found that the "admissions by the defendants substantiate plaintiffs' claim for damages" (A7)

The Fifth Circuit Court of Appeals in 1978 upheld the District Court's sound exercise of its discretion in awarding damages. Its *per curiam* opinion stated:

"The District Court correctly granted summary judgment in favor of the plaintiffs on the issue of damages. No trial was required in view of the defendants' failure to address or object to plaintiffs' request for admissions. In view of the resulting admissions, no material facts were in dispute. Fed. R. Civ. P., Rules 36, 56(e).

"The District Court's award of the maximum statutory damages pursuant to 17 U.S.C. § 101(b) was well within its discretion in view of the repeated failure of defendants to respond to plaintiffs discovery attempts seeking to establish their actual damages. No abuse of discretion appears in the record." (A16)*

On July 5, 1978, the Fifth Circuit denied petitioners' request for a stay of issuance of that Court's mandate. On July 31, 1978, Mr. Justice Powell denied petitioners' motion in this Court for the same relief.

*The Court also pointed out:

"The record is replete with evidence of defendants' instructions to counsel and responses to counsels' requests and directions illustrating that defendants concurred in the obstructionist tactics employed in this litigation for over three years. Defendants cannot ignore court orders for years, through one attorney, and, being disappointed with that course of action, demand new relief, through new counsel, on account of their own prior conduct through their own prior counsel." (A16)

There simply is no basis for the petitioners' outrageous claims that the lower Court's determinations were "misguided" or were undertaken "to penalize petitioners for their litigation behavior rather than properly fix statutory damages under the Copyright Act." (Petition, pp. 13, 14.)* Instead, as both the District Court and the Court of Appeals held, the amount of damages assessed by the Court was proper, was supported by the record, and was well within the Court's statutory discretion. Indeed, the District Court awarded less than the max-

*Petitioners somehow try to find support for their erroneous position by pointing out that the District Court detailed in its judgment the petitioners' many failures to comply with the Court's orders. (Petition, p. 13 n.17.) The District Court made explicit, however, that it considered such gross and flagrant violations of conduct to be relevant to the amount of attorneys' fees awarded and sanctions imposed under Federal Rule of Civil Procedure 37:

"This Court's decision on the amount of attorneys' fees is affected by the plaintiff's Motion for Sanctions pursuant to Rule 37(d) of the Federal Rules of Civil Procedure. This Court's further findings of fact and conclusions of law on June 17th, 1975, entitled the plaintiffs to reasonable attorneys fees pursuant to Title 17 U.S.C. Sections 101, 116 and Rule 37 of the Federal Rules of Civil Procedure. These Sanctions are being imposed upon the defendants for their failure to appear at a deposition, after being served with proper notice, on July 11, 1974, January 21, 1975, and on February 10, 1975, pursuant to this Court's order of January 30, 1975, and on April 9, 1975, pursuant to this Court's order of March 25, 1975, and on May 19, 1975, pursuant to this Court's order of May 9, 1975. These Sanctions are also imposed for the defendants' willful and deliberate violation of this Court's orders of October 21, 1974, January 30, 1975, and March 25, 1975, to produce documents requested by plaintiffs in their notice to take the deposition of William L. Taub, and for defendants' failure to comply with the provisions of paragraph 3 of this Court's Judgment as to Liability entered June 18, 1975." (A8)

Neither in the Court of Appeals nor here have petitioners challenged the District Court's authority to assess such sanctions. The Court of Appeals, without bothering to advert to the obvious propriety of Sanctions under Rule 37, held simply: "The District Court likewise acted well within its discretion in awarding plaintiffs their attorneys' fees pursuant to 17 U.S.C. § 116." (A16)

imum amount of statutory "in lieu of" damages that it could have assessed under the facts presented.*

ARGUMENT

Rule 19(1) of the Rules of this Court is explicit that "[a] review on Writ of Certiorari . . . will be granted only where there are special and important reasons therefor." Petitioners herein purport to invoke that portion of Rule 19 which permits review by Writ of Certiorari "where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter . . . or has decided a federal question in a way in conflict with applicable decisions of this court. . . ." (Supreme Court Rule 19(1)(b); Petition, p. 10).

No case cited by petitioners holds that the assessment of damages in the sound exercise of the discretion of the District Court and within the statutory limits established by Congress is improper or impermissible. Indeed, no case could so hold.

No case cited by petitioners even remotely suggests that the assessment of damages pursuant to the statutory "in lieu of" standard and consonant with admitted supporting facts constitutes the assessment of a penalty or forfeiture. Again, no case could so hold.

No fact cited by petitioners tends to establish that the District Court abrogated its statutory responsibility by assessing a penalty or forfeiture against the petitioners. To the contrary, the facts demonstrate, and the Court of

*Under Section 101, the District Court was at liberty to disregard the so-called "maximum" of \$5,000 per infringement because of its unchallenged finding that the infringements were committed "knowingly, willfully, and with notice." (Judgment as to Damages, A9) See 17 U.S.C. § 101(b) ("[N]or shall the limitation as to the amount of recovery apply to infringements occurring after actual notice to a defendant . . .").

Appeals held, that the District Court's award of damages represented a sound exercise of its statutory discretion and was amply supported by the facts.

Even granting petitioners' point that Section 101 of the Copyright Law was not designed to impose a penalty, there is no suggestion in the opinion below that a penalty was assessed. The numerous cases cited by petitioners simply have no application here: all are based on facts not even vaguely similar to those presented in this action. Certainly, they do not indicate a conflict among the Circuits or a conflict with this Court's prior decisions.

Furthermore, petitioners have not explained how, having failed to raise the issue of penalties in the District Court or in the Court of Appeals, they may do so now. It requires no citation to establish that petitioners are not permitted so to abuse the basic tenets of appellate practice.

In view of these circumstances, petitioners have utterly failed to establish any "special and important reasons" that would justify the expenditure of this Court's time, and the resources of the respondents, in further prolonging an action that has reached its just and logical terminus.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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